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No. 83-994

In the Supreme Court of the United States

OCTOBER TERM, 1983

CARL J. MOLLNOW, PETITIONER

v.

PAUL K. CARLTON, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

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Petitioner, a former Air Force officer, seeks damages from other Air Force officers for alleged wrongs incident to military service.

1. Petitioner brought this action against respondents, 14 Air Force officers. Petitioner asserts that while he was in the Air Force, he made several complaints about flight safety hazards. He alleges that respondents suppressed his complaints and warnings and in retaliation for them engaged in an elaborate conspiracy to take a variety of actions against petitioner, including removing him from flight duty, imprisoning him in a psychiatric ward, and ultimately causing him to be involuntarily discharged from the Air Force. Pet. App. 1-2. Petitioner sought damages for violations of the Constitution (see *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971)), for violations of 42 U.S.C. 1985(1) and (3), and for common law torts.

The United States District Court for the Western District of Washington dismissed the complaint (Pet. App. 14), and the court of appeals affirmed (*id.* at 1-3). The court of appeals rejected petitioner's claim under 42 U.S.C. 1985(3) on the ground that petitioner "did not allege that [respondents'] conduct was motivated by a racial or other class-based, invidiously discriminatory animus" (Pet. App. 3). The court also upheld the dismissal of petitioner's common law tort claims, ruling that the policies of *Feres* v. *United States*, 340 U.S. 135 (1950) — which held that servicemen may not sue the United States under the Federal Tort Claims Act, 28 U.S.C. 1346(b) and 2671 *et seq.*, for injuries incident to military service — preclude a tort suit by a serviceman against his fellow officers (Pet. App. 3-4).

The court of appeals then held (Pet. App. 4-7) that petitioner's *Bivens* action against his fellow officers was barred by *Chappell* v. *Wallace*, No. 82-167 (June 13, 1983). Finally, the court of appeals affirmed the dismissal of petitioner's claims under 42 U.S.C. 1985(1) on the basis of *Feres* and *Chappell*. The court of appeals reasoned that in *Feres* this Court held that Congress did not "intend[] to allow servicemen's suits under a statute that [like 42 U.S.C. 1985(1)] did not expressly allow or disallow such suits" (Pet. App. 11), and that in *Chappell* this Court counseled against permitting servicemen to sue their superior officers for damages in the absence of express congressional authorization. The court of appeals explained (Pet. App. 11-12 (emphasis in original)):

> A § 1985(1) action would strike directly at th[e] special military relationship * * *. Under § 1985(1), * * * an action would lie even for calculated decisions made in the judgment and discretion of a superior military officer * * *. Then a *civil* jury would be impaneled to inquire into the nature of this uniquely military matter, and damages could be assessed against the superiors

> for the exercise of their judgment and discretion. Such a result would offend the principles announced in *Chappell* * * *.
>
> * * * Congress * * * obviously did not intend to supplement * * * internal military procedures through the enactment of § 1985(1).

2. Petitioner's claim appears to be that, notwithstanding *Chappell* v. *Wallace*, he should be allowed to bring a *Bivens* action against military officers for alleged constitutional wrongs incident to his military service because the internal military remedies available to him were inadequate.[1] This contention is incorrect.

First, the clear holding of *Chappell* is that "enlisted military personnel may not maintain a suit to recover damages from a superior officer for alleged constitutional violations" (slip op. 9 (footnote omitted)). This holding was not contingent on whether a particular serviceman plaintiff could invoke alternative remedies. The Court discussed the alternative remedies potentially available to the *Chappell* plaintiffs only in connection with its observation that "Congress'

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[1]Petitioner contends (Pet. 17-19) that he was not on "active duty" at the time the alleged wrongs were committed against him. But the complaint itself asserts that the alleged wrongs occurred prior to petitioner's 1978 discharge from the Air Force (Complaint, paras. 7-28), and petitioner does not suggest that he was on leave or otherwise engaged in activities unconnected to military service at the time of his alleged injuries (cf. *Brooks* v. *United States*, 337 U.S. 49 (1949)). All of the wrongs are alleged to have been committed by petitioner's fellow military officers were in connection with military affairs; thus petitioner's claims implicate "the unique disciplinary structure of the military establishment" (*Chappell*, slip op. 8).

It appears that petitioner's claim that he was not on active duty status is merely a way of asserting that his superiors were not giving him the degree of responsibility to which he thought he was entitled. See, *e.g.*, Pet. 18 (alleging that respondents "downgrad[ed] [petitioner] from active duty into a status *persona non grata*").

activity in the field" is one of the " 'special factors' which dictate that it would be inappropriate to provide enlisted military personnel a *Bivens*-type remedy against their superior officers" (slip op. 8).

Second, petitioner has not shown that he lacked adequate alternative remedies. The petition itself states that petitioner "repeatedly submitted 'Complaint[s] of Wrongs' to every officer up through the chain of command" (Pet. 9). This is the remedy prescribed by Article 138 of the Uniform Code of Military Justice, 10 U.S.C. 938, and specifically mentioned in *Chappell* (slip op. 6-7). Petitioner's contention (Pet. 9) appears to be that his superior officers did not take action on these complaints. But that does not mean the remedies were unavailable or inadequate; it simply means that petitioner was unsuccessful in invoking them. A claimant cannot demonstrate the inadequacy of an alternative remedial mechanism merely by charging that those who administer it are parties to a conspiracy with those who allegedly wronged him.

Finally, petitioner does not explain why he could not invoke other internal military remedies. For example, it appears that petitioner could have sought relief from a board for the correction of military records, another remedy mentioned in *Chappell* (slip op. 7). The Board for the Correction of Air Force Records has the authority to "correct any military record of [the Air Force] when * * * necessary to correct an error or remove an injustice" (10 U.S.C. 1552(a)) and its decisions are subject to judicial review (see *Chappell*, slip op. 7). Thus the Board presumably could have provided petitioner with relief from his allegedly unlawful discharge and improper psychiatric evaluation. Petitioner does not claim that the Board, which is composed of civilians, was biased against him or was a part of a conspiracy against him.

3. Petitioner does not appear to challenge the court of appeals' rulings on his common law or statutory claims. In any event, those rulings are correct. As many courts have recognized, the policies underlying *Feres* preclude servicemen from suing their superior officers for common law torts. See, *e.g.*, *Hass* v. *United States*, 518 F.2d 1138, 1143 (4th Cir. 1975); *Mattos* v. *United States*, 412 F.2d 793 (9th Cir. 1969); *Bailey* v. *DeQuevedo*, 375 F.2d 72, 73-74 (3d Cir.), cert. denied, 389 U.S. 923 (1967); *Bailey* v. *Van Buskirk*, 345 F.2d 298 (9th Cir. 1965), cert. denied, 383 U.S. 948 (1966). See also *Feres*, 340 U.S. at 141 (footnote omitted) ("We know of no American law which ever has ever permitted a soldier to recover for negligence, against either his superior officers or the Government he is serving."). Moreover, respondents are entitled to absolute immunity from common law tort actions. See *Harlow* v. *Fitzgerald*, 457 U.S. 800, 807-808 (1982); *Butz* v. *Economou*, 438 U.S. 478, 495 (1978); *Barr* v. *Matteo*, 360 U.S. 564 (1959).

Similarly, petitioner suggests no reason to question the court of appeals' conclusion that 42 U.S.C. 1985(1) does not permit a serviceman to challenge an adverse personnel action by bringing a suit for personal damages against his military superiors. Certainly when Congress enacted what is now Section 1985(1) as part of the Civil Rights Act of 1871 (ch. 22, § 2, 17 Stat. 13), it did not believe it was granting such an extraordinary remedy to servicemen. Moreover, as the court of appeals noted, it follows *a fortiori* from *Feres* that courts should not create such a personal damages remedy on the basis of Section 1985(1). The case for allowing servicemen's suits under the Federal Tort Claims Act is stronger than that for allowing such suits under Section 1985(1);[2] and FTCA actions, which seek

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[2]The FTCA specifically includes "members of the military and naval forces" in its definition of "[e]mployees of the government" (28 U.S.C. (& Supp. V) 2671), thus revealing that Congress expected the torts of

damages from the government, are far less disruptive of military discipline than suits seeking damages against military officers in their personal capacities.[3]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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military officials to give rise to liability on the part of the United States in some contexts. Moreover, the FTCA contains several express exceptions, including an exception for "combatant activities of the military or naval forces * * * during time of war" (28 U.S.C. 2680(j)), but it contains no express exception for torts committed by one serviceman against another. There are no remotely comparable indications, in the text of Section 1985(1), that Congress intended to permit litigation arising out of military activities, particularly internal military disciplinary decisions.

[3]The court of appeals was also plainly correct in concluding that petitioner cannot maintain an action under 42 U.S.C. 1985(3) because he has alleged no " 'racial, or * * * otherwise class-based, invidiously discriminatory animus behind the conspirators' action' " (*United Brotherhood of Carpenters, Local 610* v. *Scott*, No. 82-486 (July 5, 1983), slip op. 8, quoting *Griffin* v. *Breckenridge*, 403 U.S. 88, 102 (1971)).